ARIZONA CORPORATION COMMISSION

June 24, 2005

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, DC 20554

Re: In the Matter of Truth-in-Billing and Billing Format and National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing; CC Docket No. 98-170 and CC Docket No. 04-208

Dear Ms. Dortch:

The Arizona Corporation Commission ("Arizona Commission") hereby electronically files its initial Comments in the above-captioned matter.

Please do not hesitate to contact me if you have any questions regarding this filing.

Very truly yours,

Maureen A. Scott
Attorney

MAS:klc

Enclosure

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Truth-in-Billing and Billing Format	)	CC Docket No. 98-170
	)	
National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing	)	CC Docket No. 04-208

COMMENTS OF THE ARIZONA CORPORATION COMMISSION

I. Introduction

On March 18, 2005, the Federal Communications Commission ("FCC" or "Commission") released a Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking ("Order") in this Docket. The Commission took several actions in its Order including: (1) removal of the exemption from 47 C.F.R. Section 64.2401(b) for Commercial Mobile Radio Service ("CMRS") providers; (2) denial of NASUCA's request for a Declaratory Ruling prohibiting telecommunications carriers from imposing any line items or charges that have not been authorized or mandated by the government; and (3) preemption of state regulations requiring or prohibiting line items for CMRS bills. The Commission seeks additional comment on what constitutes a government "mandated" charge; whether government "mandated" charges should be placed in a separate section of the bill; and whether further preemption of state authority in this area is warranted. The Arizona Corporation Commission ("Arizona Commission" or "Arizona") respectfully submits these comments for consideration by the FCC on the state preemption issues raised.

II. Discussion

A. The Commission Should Not Engage in BroadBased Preemption of State Authority Particularly in Important Consumer Protection Areas But Rather Should Approach These Issues on a Case by Case Basis

1. The Commission Should Reconsider its Preemption of State Authority to Impose or Prohibit Line Items

On March 30, 2004, the National Association of State Utility Consumer Advocates' ("NASUCA") filed a Petition for Declaratory Ruling with the Commission. NASUCA sought action by the Commission to prohibit telecommunications carriers from imposing any separate line item or surcharge on a customers' bill that was not mandated or authorized by federal, state or local law. The Commission not only denied the NASUCA petition but also went much further and issued an Order preempting state authority to impose or prohibit line items appearing on the bills of Commercial Mobile Radio Service Providers. While this constituted an abrupt departure by the Commission from its prior rulings, the Order (at para. 1) characterizes the action by the Commission to be one of "clarification" only. We disagree. The Arizona Commission believes that the Commission's preemption in this case was unwarranted and possibly unlawful because the Commission did not afford interested persons notice of this contemplated change in its policies and rules and allow them the opportunity to comment.

The Arizona Commission would likely have participated in the NASUCA proceeding if it had known that the Commission was actually considering taking action beyond what NASUCA requested which action would preempt the Arizona Commission's authority in this important area. However, there was no indication that the Commission was considering taking such far-reaching action in response to the NASUCA Petition. The Commission even acknowledged in its Order that "the broader issue of the role of states in regulating billing was addressed primarily in reply comments

and ex parte submissions, and received only cursory treatment in comments on the NASUCA Petition." Order at para. 37.

As a general matter, where the Commission is going to take action in a non-generic docket which goes beyond the issues raised and adversely affects nonparticipants, we believe that the Commission is required to give the nonparties notice so that they have an opportunity to participate. *See Sprint Corporation v. FCC*, 315 F.3d 369 (U.S.App.D.C. 2003)("In contrast to an informal adjudication or a mere policy statement, which lacks the firmness of a prescribed standard, an agency's imposition of requirements that affect subsequent agency acts and have a future effect on a party before the agency triggers the Administrative Procedure Act notice requirement.")

In the interest of fairness and due process, the Commission is required to give all interested persons notice either from the start or at the time it determines that its findings will be more generic in nature, that it is considering action which will affect parties other than the participants to the docket. Potentially affected parties should be given an opportunity to comment, especially when the action that the FCC is contemplating is adverse to those nonparties. *See Sprint Corporation v. FCC*, 315 F.3d 369 (U.S.App.D.C. 2003)("Notice requirement of the Administrative Procedure Act (APA) improves the quality of agency rulemaking by exposing regulations to diverse public comment, ensures fairness to affected parties, and provides a well-developed record that enhances the quality of judicial review.).

In this instance, the Commission's preemptive action is a marked departure from its prior policies or rules, and, and thus the Commission was required to give notice that it was going to take this action, and allow comment on it. The Commission appears to acknowledge that its preemption of a state's ability to impose or prohibit line items went well beyond its existing policies or rules in footnote 90 of its Order:

> The Commission never has considered, however where among section 332(c)(3)(A)'s key terms state regulation prohibiting or requiring line items should fall. We address this issue for the first time in this item and,

for the reasons expressed above, find that such regulation represents rate regulation.

Second, the discussion in the Order at para. 30 describing past Commission decisions as intending to equate "line items" with "rate elements" such that the two terms would be considered synonymous in the future, was not persuasive, and it is difficult to understand how these decisions can be viewed as supporting the preemptive action taken by the Commission. A "rate element" is part of a rate which is set in the ratemaking process. The Arizona Commission would not expect to have input into the rate elements utilized by wireless providers. Many of the line items at issue in this docket and in the NASUCA Petition, on the other hand, are not part of any ratemaking process and thus are "billing" issues, and clearly the state commissions retain authority over billing issues as discussed below.

Third, as just discussed, the Commission's actions would appear to be contrary to Section 332(c)(3)(A) and its legislative history. Congress clearly left a states authority to regulate other terms and conditions of CMRS intact which includes: "...such matters as customer billing information and practices and billing disputes and other consumer protection matters..." Whether carriers should be allowed to impose a line item on a bill or whether they should not be allowed to include a line item, is a billing practice, not "ratemaking".

Fourth, the Commission found that efforts by individual states to regulate CMRS carriers' rates through line item requirements would be inconsistent with the national policy of a uniform, national and deregulatory framework for CMRS. Order at para. 35. The Arizona Commission does not believe that this type of broad-based preemption is appropriate under current case law. Furthermore, the Arizona Commission does not believe it was ever the intent of Congress or the Courts to allow a federal agency to preempt a state based upon a generalized fear or unrealized threat of "inconsistency" with federal policy. Rather, preemption should only be resorted to on a case-by-case basis

where there is a specific state rule or statute which presents an "actual" conflict with federal policies in a particular case.

Finally, it appears to the Arizona Commission that Congress, in allowing states authority to regulate other terms and conditions of CMRS, did not want to disturb traditional areas of state regulation, in particular the states strong role in protecting consumers within its jurisdiction.

The additional reasons discussed below explaining why preemption of state authority is not appropriate in this area, applies equally to the preemptive action the Commission has already taken with respect to line items.

2. The Commission's Broad-Based Preemptive Proposal Would Be A Disservice to Consumers

The Commission should not change its current policies with respect to the interplay of federal/state authority in this important consumer protection area. That policy is contained in the Commission's Truth-In-Billing Order: "states will be free to continue to enact and enforce additional regulation consistent with the general guidelines and principles set forth in this Order, including rules that are more specific than the general guidelines we adopt today." Order at para. 49. (citing Truth-In-Billing Order, 14 FCC Rcd. 7492 at para. 26 (1999). This policy has worked well in the past, and Arizona sees no need to change it.

The Commission will be doing a disservice to consumers if it engages in the type of broad-based preemption of state consumer protection requirements in the billing area which it proposes in its FNPR. One negative result from such action would be the elimination of the local forum currently available to consumers for complaints and resolution of their complaints. Consumers expect to have a local forum available to them with expertise in the issues, particularly with respect to a service that is vested with a public interest, such as telephone service.

It has been the Arizona Commission's experience that consumers prefer and feel more comfortable dealing with a local forum that is there to address their issues rather than relying solely upon a forum that is thousands of miles away and may lack local expertise or presence but only provides a national perspective. The Commission should give serious consideration to the actions it takes in this docket. Those actions could severely restrict the consumers' ability to access their local commission with problems, because consumers may not be well served by such actions.

3. The Wireless Ex Parte Filings Cited in the FNPR Do Not Support the Broad Preemptive Action Being Proposed

It appears that the Commission has decided to revisit its prior policy and restrict state authority in this important consumer protection area primarily in response to several ex parte submissions it received from wireless providers. Order at para. 49.

It is interesting that the wireless carriers' request comes at a time when even the Commission acknowledges complaints against wireless billing practices have been increasing. In para. 16 of its Order, the Commission finds:

> The Commission's more recent data indicates that complaints regarding wireless 'billing & rates' and 'marketing & advertising' have increased significantly since that time. For example, in 1999, the Commission received only a few dozen complaints regarding wireless billing. In 2004, the Commission received approximately 18,000 complaints about wireless carrier practices in these categories. This trend is supported by the recent comments of a number of states and consumers in that proceeding. Although we acknowledge that this increase may be due in part to the significant increase in wireless subscribers since 1999, we also believe it is demonstrative of consumer confusion and dissatisfaction with current billing practices.

The wireless carriers argue that restriction of state authority in this area is necessary because of "an onslaught of state regulation that is making nationwide service more expensive for carriers to provide and raising the cost of service to consumers." More specifically, the Commission's Order states:

> Primarily in ex parte submissions, wireless carriers have argued that there are other bases for the Commission to preempt state regulation of carriers' billing practices, and that a change in course from our pronouncement in

> the Truth-in-Billing Order regarding states' roles in regulating carriers' billing practices is necessary to stem an onslaught of state regulation that is making nationwide service more expensive for carriers to provide and raising the cost of service to consumers.

Order at para. 49.

The Order refers to a December 13th (no year given) ex parte filing by Nextel/T-Mobile and a January 25th (no year given) ex parte filing by Verizon Wireless which cites a "Minnesota statute, regulatory actions in Colorado and Indiana, and proposed regulatory actions in New Mexico and Vermont". Order at footnote 148. The Arizona Commission has not had an opportunity to review the regulations or proposed requirements of these five states, but would not label their actions or proposed actions to be an "onslaught" of state regulation. In addition, as noted above, the FCC itself acknowledges that wireless complaints have risen dramatically in recent years. It should not be surprising, therefore, that some states may desire to implement measures given these circumstances to address the concerns of consumers in their states.

The Arizona Commission itself has previously been faced with arguments that any consumer protection regulation it imposes will increase the carriers' cost. On August 5, 2004, the Arizona Commission commenced its own Truth-in-Billing Investigation due to concerns over the proliferation of line item charges appearing on both wireline and wireless bills. The Arizona Commission is particularly concerned about the false impression being conveyed to consumers by some carriers that particular line item charges have been mandated or imposed by the government when in fact they have not been. While the Arizona Commission has taken no action to-date, it has been faced with similar arguments by wireless carriers: "don't do anything because it will increase our cost of doing business nationwide."

The Arizona Commission believes that carriers know when they enter a business that is vested with a public interest, that there are going to be regulatory costs associated with it. That is a cost of doing business. The Arizona Commission firmly believes that a

balancing of interests has to occur i.e., the cost of service versus the interests of consumers in having fair, accurate and non-misleading billings and in having a local forum available to them to address and resolve their complaints. Arizona does not believe that the FCC should take precipitous action based on vague assertions of possible actions in five states without requiring more concrete evidence of harm. Abandoning an effective network of local protections in favor of a "one size fits all" nationwide solution in response to the actions or proposed actions of five states would seem unwise.

Notably, the Commission's Second Further Notice of Proposed Rulemaking gives no indication of what the costs are of which carriers complain. The Arizona Commission is concerned about the scarcity of data and lack of concrete harm presented in the FNPR, yet the FCC is contemplating "limiting state regulation of CMRS and other interstate carriers' billing practices, in favor of a uniform, nationwide, federal regime, [that] will eliminate the inconsistent state regulation that is spreading across the country, making nationwide service more expensive for carriers to provide and raising the cost of service to consumers." Order at para. 52. Further, it appears that based upon the ex parte filings by Verizon Wireless, Nextel and T-Mobile, the Commission has decided that "the line between the Commission's jurisdiction and states' jurisdiction over carriers' billing practices is properly drawn to where states only may enforce their own generally applicable contractual and consumer protection laws, albeit as they apply to carries' billing practices." Order at para. 53. The course of action being proposed has far-reaching ramifications for a consumer's ability to access his or her local forum. The possibility of the FCC taking such action based upon the ex parte filings of several wireless providers, is of significant concern to the Arizona Commission.

At para. 54 of its FNPR, the Commission cites to a Verizon Wireless complaint regarding a New Mexico and California regulation, and asks whether "protections against 'cramming' properly fall within the Commission's jurisdiction, or within states' jurisdiction," suggesting that the Commission may be considering preemptive action in

this area as well. Again, the Commission should consider any preemption in this area very carefully because of the potentially adverse impact on consumers.

B. The Commission's Broad-Based Preemptive Proposal is Legally Suspect

The Commission's ability to engage in this sort of broad-based preemption is legally suspect. The Supreme Court's landmark decision in *Louisiana Public Service Commission v. FCC*, 476 U.S. 344, 375, n. 4, 106 S.Ct. 1890, 1902, n.4, 90 L.Ed.2d 369 (1986), recognized an "impossibility" exception to the limitation on the FCC's authority set forth in section 2(b)(1). The Court held that the FCC may preempt a state regulation where it is "not possible to separate the interstate and intrastate components of the asserted state regulation." *Id.* The FCC may regulate "when the state's exercise of that authority negates the exercise by the FCC of its own lawful authority over interstate communication." *California v. FCC*, 905 F.2d 1217, at 1243 (9th Cir. 1990)("*California I*"). The Courts, however, have interpreted the impossibility exception narrowly. *Id.* The FCC must demonstrate that the state regulation would negate valid FCC regulatory goals. *Id.*

> [T]he FCC bears the burden of justifying its entire preemption order by demonstrating that the order is narrowly tailored to preempt only such state regulations as would negate valid FCC regulatory goals.

California I, 905 F.2d at 1243.

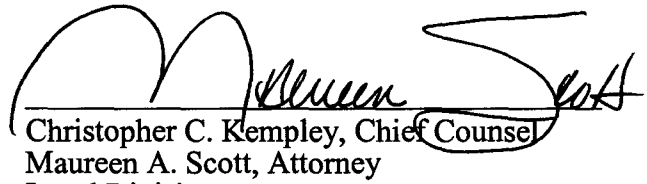
Here, the Commission has no Arizona regulation before it which is inconsistent with its regulatory goals. Yet, the Commission's proposed preemption would take away the Arizona Commission's ability to adopt additional or more specific regulations in the future to protect its consumers in this important area. In essence, the Commission without having the benefit of any specific Arizona regulations before it since they haven't been proposed or adopted yet, has already decided that they are likely to conflict with its "regulatory goals" when they are adopted in the future. The Commission should make its preemption decisions on a case by case basis based upon existing regulations that it finds

to conflict with its regulatory policies, rather than making such far reaching findings that every conceivable regulation a state adopts in the future is likely to be in conflict with its regulatory goals.

III. Conclusion

The Arizona Commission asks the FCC to reconsider the preemptive path it has laid out in its Second Further Notice of Proposed Rulemaking. The Arizona Commission believes that the broad-based preemption outlined in the FNPR exceeds the FCC's authority under the Communications Act, and the case law interpreting state/federal authority in this area. The Arizona Commission appreciates the opportunity to offer comment on these important issues and looks forward to offering further comment in the reply phase of this proceeding.

RESPECTFULLY submitted this 24th day of June, 2005.



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